

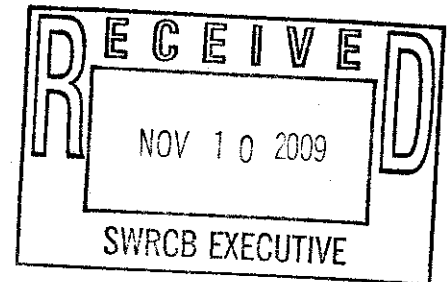


Brian J. Johnson
Director, California Water Project
Staff Attorney

11/18/09 Board Workshop
Russian River Frost Protection
Deadline: 11/10/09 by 12 noon

November 10, 2009

Mr. Charlie Hoppin, Chair
and Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via email to commentletters@waterboards.ca.gov



Re: 11/18/09 Russian River Frost Protection Workshop

Dear Mr. Hoppin and Members of the Board:

On behalf of Trout Unlimited (TU), I submit the following comments for the Workshop to Consider Recommendations for Actions regarding Water Diversions for Purposes of Frost Protection in Mendocino and Sonoma Counties. Since the April workshop, we have continued to participate in the Frost Protection Task Force and have had many discussions with the proactive vineyards and with the regulatory agencies about the solutions to this problem.

Trout Unlimited supports NOAA's renewed request for the State Board to adopt reasonable use regulations to eliminate take of listed species from frost protection. This is the only way to avoid further fish kills. As NOAA wrote,

Failure to do so will continue to result in take, and the use of tremendous volumes of water diverted for frost protection will continue to pose a future threat to ESA listed salmonids, some on the verge of extinction, throughout the entire Russian River watershed.

The state of Russian River fisheries is such that we no longer have any margin for error. There is no more opportunity to wait and see how ongoing conservation efforts play out before we take meaningful action on water. In the Russian River, coho salmon are almost extirpated. Only the coho broodstock program (the salmon equivalent of the captive condor effort) and restoration projects undertaken by wildlife agencies, private landowners, and other stakeholders in a heated race against the clock are keeping hope alive. Since the Russian River is located in the heart of the Central California Coast coho salmon evolutionary unit and historically supported one of its largest runs, the loss of the Russian River population threatens the survival of the entire species. For steelhead, the situation is slightly less desperate, but only slightly.

Without a reasonable use rule, the agencies will lack the three pieces of information they require to conclude that their regulatory programs do not lead to take: (1) the locations where people frost protect; (2) the landowners that are undertaking conservation measures (or not) and the conservation measures that they are taking; and (3) the resulting condition of the streams.

Despite difficult economic times, many vineyard owners are stepping forward to change their water supply practices, and several have invested significant sums of money and effort to avoid harm to fish. Unfortunately, many other landowners have not. Some are undoubtedly

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hoping that investments by others will take the pressure off themselves, that the concern over frost protection will prove a passing fad, that the agencies will get distracted by the next crisis, and that they will be left to continue with business as usual.

It is deeply unfair to the businesses that play by the rules and pursue conservation actions that they face ever more scrutiny while some of their competitors continue with destructive or even illegal diversions and face no consequences. Moreover, the lack of monitoring (of both streamflow and water use) frustrates the ability of both the wine industry and regulators to identify problematic diversions and find solutions that benefit listed species. Without a reasonable use regulation, we will not know how many others will also change their practices or how many will not. And we have no way of measuring progress or adapting the program to find the most practical and highest priority solutions.

There are documented fish kills from diversions for frost protection, and many reasons to think the problems are widespread. Given the high rate of pumping for direct diversions for frost protection and the small size of some of the tributaries where the diversions are located, the diversions create some risk to listed fish in every tributary where they take place. To avoid take, the agencies must get better information about the nature of that risk and take steps to manage it.

We offer the following recommendations for the reasonable use regulation:

First, we believe that the program on the Napa River, which provides that certain practices are "unreasonable unless" protective measures are taken, is a framework that makes sense. While that rule may not be directly transferable, we think it offers a useful starting point.

Second, we agree with many task force participants that there should be an emphasis on shifting from direct diversions to either alternative technologies (e.g., wind) or coordinated refill of irrigation ponds. Direct diversions became the default tool for frost protection because water was relatively available, cheap, and unregulated. As the downside of direct diversions has become apparent, some leaders within the industry have already changed their practices to rely on wind machines or diversions to storage. No one doubts that many other landowners can do so too.

Third, the reasonable use rule must include monitoring and reporting of diversions, as well as monitoring and reporting of stream conditions. Without this information, it will be impossible for the agencies to know whether the program is functioning. For example, if further fish kills occur, the agencies would not know whether that resulted from conservation measures being too weak, or whether the conservation measures were adequate but were foiled by non-participants. It is in the interest of all landowners who are stepping forward with conservation measures that the agencies have good information about their streams; such information will show which landowners have done their part as well as those who have not.

Finally, we believe the frost program should include a focus on compliance with existing laws. Ensuring that all diversions have a valid basis of right and a streambed alteration agreement would go a long way toward improving conditions for fish. Although this step seems obvious to us, it is frequently overlooked.

In closing, we wish to emphasize that our comments are not a criticism of the work done by the proactive winegrowers you will hear from at the workshop. We mean it as a way to strengthen those efforts and to extend them to more participants. Some of the Mendocino

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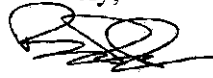
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growers (e.g., La Ribera, Sawyer, Fetzer, Dolan, and Beckstoffer) deserve special thanks for stepping forward and improving their practices, and the Russian River Flood Control District deserves special praise for its part. Many Sonoma County growers are also taking a leadership role, as are the county Farm Bureaus, Fish Friendly Farming, and others.

If anything, we think it would benefit the proactive growers to have a generally applicable rule so that their competitors cannot profit from inaction. But we understand why even forward-thinking vineyards will not be the ones to call for regulation of their friends and neighbors, even if they would benefit from it. This is your agency's responsibility.

Thank you for your consideration of our comments. A summary of our recommendations is attached.

Sincerely,



Brian J. Johnson

Attachment
Trout Unlimited Recommendations
SWRCB November 18 Frost Protection Workshop

- The State Water Board should adopt reasonable use standards for frost protection.
 - There should be emergency regulations for 2010.
 - There should be a permanent regulation.
- The Board should establish that diversions for frost protection are “unreasonable unless” certain measures to avoid “take” of listed species are enacted.
- These measures should include monitoring and reporting.
 - Disclosure of points of diversion for frost protection and the basis of right for each.
 - Monitoring and reporting of diversions.
 - Monitoring and reporting of stream conditions. This might best be accomplished by requiring participation in a transparent regional monitoring program.
- These measures should include compliance with existing laws. This includes:
 - Diversions must have a valid basis of water right (certified by SWRCB).
 - Diversions must be covered by a Streambed Alteration Agreement (or following notification to DFG, a determination that none is required).
 - Diversions that result in take of endangered species are unreasonable unless covered by an incidental take statement or incidental take permit.
- The reasonable use rule should consider:
 - Support for alternative technologies (e.g., wind) where feasible.
 - Support for coordinated diversions to storage as an alternative to direct diversions, where such diversions are conditioned to avoid harm.
 - Support for storage in an amount to cover irrigation as well as frost protection, where possible.
 - Support for continued diversions for frost protection if (and only if) the diverter can show that the diversions will not cause harm to, and are consistent with recovery of, listed species.
 - A process for diversions from wells to opt out of the rule if it can be shown that the diversions do not affect surface flows and, therefore, cannot affect habitat for listed species.
- The reasonable use rule should encourage local solutions to frost protection issues; it should strengthen rather than supplant the ongoing efforts of Task Force members.
- The State Water Board should continue its efforts to promote permitting for projects that benefit listed species.
- The State Water Board should prioritize completion of the A.B. 2121 Instream Flow Policy for its own sake and to establish a stable framework for permitting diversions to storage.
- The State Water Board should take predictable, fair, and certain enforcement actions against illegal diverters. Until the state is prepared to stop illegal diversions, those diversions will continue, and landowners who play by the rules will continue to be at a competitive disadvantage.